18-623

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~385~~ 170

ALBERT GRANT, APPELLANT,

vs.

SAMUEL STRONG.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 4, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 383.

ALBERT GRANT, APPELLANT,

vs.

SAMUEL STRONG.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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2 *Bill of complaint.—Filed April* 15, 1870.

In the supreme court of the District of Columbia, the 15th day of April, 1870.

SAMUEL STRONG, *vs.* ALBERT GRANT, THOMAS BRADLEY & ENOCH Totten, Lewis Ladomus & William P. Ellison, W. S. Lincoln & Charles D. Willard, Enoch Totten, W. S. Fletcher, Charles Ford and Samuel Ford.	Equity. No. 1956. Docket 10.

Bill of complaint.

To the supreme court of the District of Columbia holding an equity court for said District:

The plaintiff states as follows:

1st. That he is a citizen of said District, doing business as a contractor, and brings this suit in his own right.

2d. That the defendant, Grant, is a citizen of the same place and is the owner of lots numbered 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, of Grant's subdivision of square numbered 760 in the city of Washington and District of Columbia, and is sued in this action in his individual capacity as such owner.

3d. That the following incumbrances rest upon said square 760, to wit: One deed of trust executed by A. Grant and wife to secure the purchase-money, to wit, $47,287.15, said deed of trust covering the whole of said square, in which said deed Thomas Bradley and Enoch Totten, both of Washington, D. C., are the trustees, and William P. Ellison, (trustee for the use of the heirs of John Moore, deceased,) and Lewis Ladomus, both of the city of Philadelphia, and State of Pennsylvania, are beneficiaries, said deed bearing date the 1st of September, 1868, and being re-
3 corded in liber 16 T and R, of the land record of the District of Columbia. That there is a deed of trust executed by A. Grant and wife on lot 16 of said Grant's subdivision of said square 760 to secure $1,120, in which deed the defendants W. S. Lincoln and Charles D. Willard, both of Washington, D. C., are trustees, said deed bearing date the 1st November, 1869, and being recorded in liber 603, fol. 506, etc., of the land records of the District of Columbia.

That there is another deed of trust executed by said Grant and wife on lots numbered 17, 18, 19, and 20 of said Grant's subdivision of said square 760, in which deed the *the* defendant Enoch Totten is trustee and W. S. Fletcher beneficiary, said deed being to secure the payment of $5,000, and bears date 24th February, 1870, and is recorded in liber 609 of the land records of the District of Columbia. That on the 5th day of March, 1870, A. Grant and Harriet T. Grant executed two deeds in fee-simple, one of lot 30 of Grant's subdivision of said square 760 to Charles Ford and Samuel Ford as joint tenants, for $10,500, said deed being recorded in liber 611 of the land records of the District of Columbia, and the other of lot 29 of said Grant's subdivision of said square 760, same being recorded in liber 611 of the land records of the District of Columbia, the consideration being the sum of $8,000.

4th. That under a contract with said Grant, he furnished at different times, between October the 14th, 1869, and January 1st, 1870, materials

and labor in the erection of sixteen brick houses on said lots 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, amounting in value to $1,547, which is wholly unpaid and in no way secured.

5th. That the said materials and labor were furnished by the plaintiff at the said Grant's request, and consisted in laying in mortar 221,000 brick in the construction of said houses, which are not yet completed.

4 6th. That on the 7th day of January, 1870, he filed with the clerk a notice of his intention to hold a lien on said lots 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, and improvements for the said amount of $1,547, also the particulars of demand, both of which are filed herewith, marked S. S., and prayed to be made a part hereof.

And the plaintiff prays that all of said deeds may be brought into court and read as part hereof, and that said defendants, Grant, Bradley, Totten, Ladomus, Ellison, Lincoln, Willard, Totten, Fletcher, Charles Ford, and Samuel Ford, be made parties defendant hereto; that the U. S. writ of subpœna may be issued against them, and that they be required to answer under oath the matters herein stated.

7th. That the said premises or all of said Grant's interest therein be sold and the proceeds of such sale applied to the discharge of the plaintiff's lien.

8th. That the two deeds to Samuel and Charles Ford be declared null and void, as also the deed of trust to secure W. S. Fletcher, being without consideration.

9th. That the plaintiff may have such other and farther relief as the nature of his case may require.

SAMUEL STRONG.

FRANK TRIST,
Solicitor for Plaintiff.

Subscribed and sworn to before me, April 15, 1870.

R. J. MEIGS, *Clerk.*

5 (Copy.)

Claim under lien law.—Filed January 7th, 1870.

SAMUEL STRONG }
vs.
ALBERT GRANT. }

In the supreme court of the District of Columbia:

To R. J. MEIGS, Esq.,
Clerk of the Supreme Court of the District of Columbia:

SIR: You will please file in your office this notice to Albert Grant, and to whom it may concern, of my intention to claim and hold a lien on lots 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30, of Grant's subdivision of square No. 760, being upon and embracing the south front of said square in the city of Washington, District of Columbia, together with the improvements thereon, consisting of (16) sixteen dwelling-houses in course of construction, for work and labor done and performed and materials furnished, under contract with Albert Grant the owner thereof.

I claim the sum of ($1,547.00) fifteen hundred and forty-seven dollars with interest thereon from the first day of January, A. D. 1870, the same to be payable in three months from the said first day of January, A. D. 1870, as per settlement of the 1st day of January, A. D. 1870, and the annexed account, which is filed as part of this lien.

(Signed) SAMUEL STRONG.

Albert Grant to Samuel Strong, Dr:

To laying 221,000, at $7 per M..... $1,547 00

Payable three months from January 1st, 1870.

(Signed) SAMUEL STRONG.

JANUARY 6TH, 1870.

True copy. Test:

(Signed) R. J. MEIGS.

6 *Summons to answer.—Issued April* 15, 1870.

In the supreme court of the District of Columbia.—April 15th, 1870.

SAMUEL STRONG, COMPLAINANT,
vs.
ALBERT GRANT ET AL., DEFENDANTS. } No. 1956. Equity dock. 10.

The President of the United States to Albert Grant, A. Thomas Bradley, Enoch Totten, Lewis Ladomus, William P. Ellison, W. S. Lincoln, Charles D. Willard, W. S. Fletcher, Charles Ford, and Samuel Ford, defendants:

You are hereby commanded to appear in this court at its first special term, occurring twenty days after service of this subpœna, and answer the exigency of the bill, under pain of attachment and such other process as the court shall award.

Witness, D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

MEMORANDUM.—That the defendants are to enter their appearance in this suit in the clerk's office on or before the special term
7 to which this writ is returnable, otherwise, the bill may be taken for confessed.

Marshal's return.

"Not to be found, Lewis Ladomus, W'm P. Ellison. Summoned all the others, April 18th, 1870.

"A. SHARP, *Marshal.*"

8 In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
ALBERT GRANT ET AL.

Answer of Defendant Grant.

The separate answer of the above-named defendant, Albert Grant, to the bill of complaint of the above-named plaintiff.

The said defendant, Albert Grant, for answer, says:

1. He admits that the said complainant, Strong, did peform certain labor, and furnish certain materials in and about the said dwelling-houses, in pursuance of a certain contract, in writing and under seal, made and entered into between said Strong and this defendant, on or about the 14th day of October, A. D. 1869, a copy of which contract is herewith filed, marked Exhibit "A," and made part of this answer, and he admits that he is the owner of the said premises mentioned in said bill.

2. That by the terms of said contract, he was to furnish all the labor and materials, except brick, necessary to lay the bricks, for sixteen dwelling-houses on the said premises, and was to receive in payment therefor, from the defendant, a deed for and to one of said lots, with the dwelling-house thereon, said deed to be executed and delivered in escrow, to Enoch Totten, until the completion of the said work by said Strong, in fulfillment of said contract; said deed was accordingly executed and delivered in escrow to said Totten.

3. Said complainant entered upon the work, in pursuance of said contract, and proceeded for a short time therewith, and then, and on or about the 20th of November, 1869, refused to go on any further with the same than to the first joists of said house, to the great injury of this defendant.

9 4. That, afterwards, on or about the 27th day of November, 1869, said complainant and this defendant came together and agreed in writing under their hands and seals, to cancel said contract and said deed, and thereupon made a settlement of their said business, whereby said Strong agreed to do the brick-work of said dwellings, up to the first-floor-joists, for which this defendant agreed to pay him at the rate of seven (7) dollars per thousand brick, by giving him the negotiable promissory note of this defendant, payable within three months after the completion of the work, as specified in said contract, last herein mentioned. That said work was finished accordingly, and the same amounted to the sum of $1,547.00, for which sum this defendant, on the first day of January, 1870, executed and delivered to said Strong his promissory note, payable in three months after the date thereof, to the order of said Strong, and another contract, in writing and under seal, was thereupon executed and delivered, by and between the said parties, declaring the said deed null and void.

A copy of each of said contracts, last mentioned, are herewith filed, marked, respectively, Exhibits "B" and "C," and made a part of this answer.

5. For a further answer, this defendant says that he is informed and verily believes that the said complainant transferred the said promissory note soon after its date, and before the maturity thereof, to one Gideon L. Walker, who he believes is and was at the time of the commencement of this suit, the lawful owner and holder of said note, and that said Walker notified this defendant about the time said note fell due not to pay said note, or any part thereof, to any person other than himself, for the reason that said note had been sold to him, and had afterwards been surreptitiously obtained from the bank, where the same had been deposited by him.

10 That the said note is still outstanding and unpaid, for the rea-

son above set forth, and that he is and ever has been ready and willing to pay the same.

Further answering, this defendant says that the deed of trust to Enoch Totten, mentioned in said bill to secure the payment of $5,000 to W. S. Fletcher, and dated on the 24th day of February, 1870, was made for a valuable consideration, and has been duly released, and the release has been duly recorded, and further this defendant says, that the said deed to Samuel and Charles Ford, were, and each of them was, given for the consideration therein named, and that the said sales were in good faith.

And this defendant is advised and believes that the said complainant is not entitled to a lien upon the said property, because he refused to finish his said contract, and on account of the premises; and that the complainant's remedy, if he had any against this defendant, is in a court of law and not in a court of equity, and this defendant prays that he may have the same benefit and advantage by this answer as if he had demurred to the bill in the first instance.

And having fully answered the said bill of complaint, he prays to be hence discharged, with his reasonable costs in this behalf expended.

A. GRANT.

ENOCH TOTTEN,
Counsel for Defendants.

DISTRICT OF COLUMBIA,
County of Washington:

I do solemnly swear that I have heard read the foregoing answer by me subscribed, and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that the facts therein stated upon information and belief I believe to be true.

Subscribed and sworn before me this 30th day of June, A. D. 1870.
CHARLES WALTER, *J. P.*

EXHIBIT A.

This exhibit is the original contract made by Strong and Grant, dated October 14, 1869, by which Strong agreed to do the brick-work for sixteen dwelling-houses on the premises mentioned in the complaint, and to finish the same before the first day of May, 1870. For this work Grant agreed to pay him at the rate of $8.50 per thousand for common, and $30.00 per thousand for pressed bricks. Strong was to take one of the houses at the price of $9,000.00.

EXHIBIT B.

Memorandum of an agreement made and entered into by and between Albert Grant and Samuel Strong, each of the city of Washington, D. C.

Whereas, on or about the 14th day of October, 1869, the said Grant and Strong made and entered into an agreement in writing for the doing of the brick-work on sixteen dwelling houses being constructed by the said Grant on South "A" street, in said city, it is hereby agreed by and between the parties hereto as follows: The said Strong agrees to do and finish all the brick-work upon said building up to the first-floor joists without delay, upon the completion of which said Grant agrees to pay the said Strong therefor the sum of seven (7) dollars per thousand

brick, the measurement to be made in accordance with the terms and provisions of the said agreement of October 14th, 1869. The same to be payable in three months (3) from the date of the completion of said brick-work by negotiable note of said Grant, upon the completion of which it is mutually agreed that the said agreement of October 14th, 1869, shall be cancelled and declared null and void and of no effect, and the deed in escrow by Enoch Totten, esq., in favor of said Strong, be delivered to said Grant; otherwise said agreement of October 14th, 1869, to remain in full force and effect.

Witness our hands and seals this 27th day of November, 1869.

(Signed) SAMUEL STRONG. [SEAL.]
(Signed) A. GRANT. [SEAL.]

Attest:
(Signed) HOLLON RICHARDSON.
(Signed) W. S. FLETCHER.

EXHIBIT C.

Memorandum of an agreement made and entered into between Samuel Strong and Albert Grant, both of the city of Washington, D. C.

Whereas, on the 27th day of November, A. D. 1869, the said Grant and Strong entered into an agreement in writing of a certain tenor and effect therein particularly stated, to which reference is had herein; and whereas the said agreement has been in all respects fully complied with by both parties thereto;

And whereas upon measurement of the brick-work done in pur-
13 suance of said agreement of November 27th, 1869, the amount has been ascertained to be two hundred and twenty-one thousand (221,000,) which, at the price agreed upon, to wit, $7.00 per M., would amount to the sum of $1,547.00, for which sum the said Grant has given his promissory note of even date herewith, and payable three months after the date thereof, in favor of Samuel Strong:

It is therefore agreed by and between the parties hereto that, in consideration of the premises, the deed mentioned in the said agreement of November 27th, 1869, as delivered to Enoch Totten in escrow on the lot 16, in square 760, according to Grant's recorded subdivision of said square, be null and void and of no effect, and that the same be returned to the said Grant by the said Totten.

Witness our hands and seals this first day of January, one thousand eight hundred and seventy.

(Signed) SAMUEL STRONG. [SEAL.]
(Signed) A. GRANT. [SEAL.]

Signed and sealed in presence of—
(Signed) HUGH T. TAGGART.

14 *Answer and demurrer of Enoch Totten.—Filed July* 5, 1870.

In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
ALBERT GRANT ET AL. } Equity. No. 1956.

Answer and demurrer of the defendant Enoch Totten to the bill of complaint of the above-named complainant:

This defendant, for answer to that part of said bill of complaint re-

lating to the deed of trust on lots 17, 18, 19, and 20, bearing date on the 24th day of February, 1870, to secure the payment of $5,000.00 to W. S. Fletcher, mentioned in said bill, says that said deed of trust was made for a valuable consideration, and in good faith. And he says, further, that the said deed of trust has been released, and that the release has been duly recorded.

And to so much of said bill as relates to the deed of trust to this defendant, and A. Thomas Bradley, to secure the payment of $47,287.15 to Lewis Lodomus and William P. Ellison, bearing date September 1st, 1868, mentioned in said bill, this defendant doth demur thereto, and says that the said complainant hath not, in and by his said bill, stated such a case as doth or ought to entitle him to the relief thereby sought or prayed for, or to any relief against this defendant.

15

ENOCH TOTTEN.

I hereby certify that, in my opinion, the foregoing demurrer is well-founded in point of law.

BENLY LOVEJOY,
Of Counsel.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I do solemnly swear that the above demurrer is not interposed for delay.

ENOCH TOTTEN.

Subscribed and sworn to before me this 5th day of July, A. D. 1870.

R. J. MEIGS, *Clk,*
By R. J. MEIGS, *Ass't Clk.*

16 *Answer of W. S. Lincoln and Charles D. Willard.—Filed July 5, 1870.*

In the supreme court of the District of Columbia.

SAMUEL STRONG *vs.* ALBERT GRANT ET AL. } Equity. No. 1956.

The joint answer of the defendants W. S. Lincoln and Chas. D. Willard to the bill of complaint of the above-named complainant:

These defendants, for answer, say that they admit that they are trustees, as alleged in said bill, but they allege that said deed of trust was executed about the time of the alleged contract of the complainant with said Grant, and that the said deed was duly recorded; that said alleged contract between said complainant and said Grant was never recorded; and that these defendants had no notice of the existence of said contract at the time of the execution of said deed of trust, and they therefore claim that their said lien on said lots takes precedence over the lien (if he have any) claimed by said complainant.

17

And the said defendants, further answering, say that the said complainant never finished the work in pursuance of said contract, but abandoned the same; and that he afterwards accepted from said Grant a negotiable prom*m*is'ory note, payable in three months from date, for the

work he had done under said contract, and that he transferred said note, by endorsement, before maturity, to one Gideon L. Walker, who is now the lawful owner and holder of said note.

W. S. LINCOLN.
CHA'S D. WILLARD.

ENOCH TOTTEN,
Counsel for Def'ts.

18 *Answer of W. S. Fletcher.—Filed July 5, 1870.*

In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
ALBERT GRANT ET AL. } Equity. No. 1956.

The separate answer of the defendant W. S. Fletcher to the said complainant's bill of complaint:

This defendant, for answer, says that the deed of trust on lots 17, 18, 19, and 20, mentioned in said bill, to secure the payment to him of $5,000.00 was made in good faith and for a valuable consideration. And he says further that the said indebtedness, amounting, principal and interest, to $5,091$\frac{23}{100}$ has been paid; and that a release of said deed of trust has been duly executed and delivered by said trustee to the defendant Grant; and the said release has been duly recorded; and the said defendant, having fully answered the complainant's said bill,
19 prays that he may be hence dismissed with his reasonable costs.

W. S. FLETCHER.

ENOCH TOTTEN,
Counsel for Def'ts.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I do solemnly swear that I have heard read foregoing answer, by me subscribed, and know the contents thereof; and that the facts therein stated upon my personal knowledge are true; and that the facts therein stated upon information and belief I believe to be true.

Subscribed and sworn to before me this day of , A. D. 1870.

20 *Demurrer of A. Thomas Bradley, Lewis Lodamus, and William P. Ellison.—Filed July 5, 1870.*

In the supreme court of District of Columbia.

SAMUEL STRONG
vs.
ALBERT GRANT.

The demurrer of the defendants A. Thomas Bradley, Lewis Lodomus and William P. Ellison, to the bill of complaint of the above-named Samuel Strong:

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said petition contained to be

true in manner and form as the same are therein set forth, doth demur thereto, and, for cause of demur'er shows:

That the said complainant hath not in and by his said bill of complaint stated such a case as doth or ought to entitle him to maintain any suit against these defendants, or to entitle him to any such relief as is thereby sought and prayed for against these defendants.

21

A. THO'S BRADLEY.
LEWIS LODOMUS.
W'M P. ELLISON.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

ENOCH TOTTEN,
Counsel for Defendants.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I do solemnly swear that the foregoing demurrer is not interposed for delay.

A. THO'S BRADLEY,
Trustee.

Subscribed & sworn to before me this 5 day of July, A. D. 1870.
R. J. MEIGS, *Cl'k, &c.*

22 *Replication.—Filed July* 9, 1870.

In the supreme court of the District of Columbia.

SAMUEL STRONG
v.
ALBERT GRANT ET AL. } Law. No. 1956.

The complainant hereby joins issue with the defendant.

FRANK TRIFF,
Compl'ts Att'y.

Joinder in demurrer.—Filed July 20, 1870.

In the supreme court of the District of Columbia, sitting in equity.

SAMUEL STRONG
v.
ALBERT GRANT ET AL.

The complainant says his bill of complaint is good in substance, and that he has a remedy in this court.

FRANK TRIFF, *Att'y for Pl'ff.*

23 *Bond of release of mechanics' lien.—Filed Oct.* 4, 1870.

In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
ALBERT GRANT. } Equity. No. 1956.

Proceedings under mechanics' lien law. Amount claimed, $1,547

The defendant Albert Grant, and William H. Heustis and Calvin S. Mattoon, his sureties, hereby undertake for themselves and each of them, their and each of their heirs, executors, and administrators, to satisfy and pay the judgment that may be recovered against said defendants on account of said lien, in consideration of the release of the lots numbered fifteen to thirty inclusive, in square numbered 760 in Wash-
24 ington City, from the lien claimed by the plaintiff in the above proceedings and cause.

Dated this 3d day of October, 1870.

ALBERT GRANT.
WILLIAM H. HEUSTIS.
CALVIN S. MATTOON.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Calvin S. Mattoon, being first duly sworn, doth depose and on his oath say that he is worth, in real estate situated within the District of Columbia, the sum of fifteen thousand dollars, over and above all his liabilities.

CALVIN S. MATTOON.

Subscribed & sworn to before me this 3d day of October, 1870.
CHA'S WALTER, *J. P.*

DISTRICT OF COLUMBIA,
County of Washington, ss:

William H. Heustis, being first duly sworn, doth depose and on
25 his oath say that he is worth, in real estate situated in the District of Columbia, the sum of four thousand dollars, over and above all his liabilities.

WILLIAM H. HEUSTIS.

Subscribed and sworn to before me this 3d day of October, 1870.
CHARLES WALTER, *J. P.*

Approved this 4th day of October, 1870.
By the court.

26 PLAINTIFF'S TESTIMONY.

CHRISTOPHER JARRETT, of lawful age, a resident of Washington, D. C., and by occupation a bricklayer, a witness produced and sworn on behalf of the plaintiff, deposeth and saith:

I know Colonel Strong and Albert Grant. So far as I know, Mr. Strong did some work for Mr. Grant on South A street, between 2d and 3d streets east. I went to Mr. Strong, on or about the 27th November. I went to Mr. Strong for some lime. The lime was running out. He told me he was about to stop the work. I told Mr. Grant that Mr. Strong was going to stop work; that he told me to work up what lime there was, and he would pay me for what was done. Mr. Grant appeared always satisfied with the work from the commencement. Mr. Strong paid me every cent that was due me.

CHRIS. JARRETT.

JOHN A. GRIMES, of lawful age, a resident of Washington, D. C., and by occupation a clerk, a witness produced and sworn on behalf of the plaintiff, deposeth and saith:

I know General Albert Grant and Colonel Samuel Strong. I was present when Mr. Grant and Mr. Strong had a talk about the payment of some work done by Mr. Strong. It was about the 27th of November, 1869. In the fore part of the day of the 27th November, Mr. Grant came over to see Col. Strong, near the buildings, the 16 buildings that Mr. Strong was putting up for Col. Grant, near the corner of 2d and A streets, when Mr. Grant came to where Col. Strong was, and wanted to know why he had stopped the delivery of lime and sand. Col. Strong told him that he was going to stop the work, as soon as he worked up what materials he had there, because Grant had deceived him and he was afraid he would not be paid for the work. Mr. Grant said it would ruin him if he stopped the work, or something to that effect. Col. Strong,
28 observed that he could not go on unless he was secured; that he was paying his money out without any prospect for it, and he was going to quit it. Mr. Grant remarked that he would like him to go, anyhow, as far as to put up the foundations of the buildings. The first floor of beams was spoken of in the conversation. Col. Strong said he would not go on unless there was a new contract and he was secured for the work he was doing; that he did not consider that he had any security for the work. In that connection a promissory note was spoken of. Mr. Grant observed to Col. Strong, that if he would lend him $500, he would, when the work was completed up to the first floor of joists, give him his note at 90 days, for the work. Col. Strong wanted to know he would give as endorser for the note. Mr. Grant said he thought the note was good enough, as the buildings were worth it, and he would have the lien on the buildings for the payment of the note. Mr. Strong did lend him the $500. I got the check-book and saw Mr. Strong draw the check.

29 Question. So far as you know, did you understand that Grant consented to the mechanics' lien being the security for this promissory note instead of the endorser.

(Question objected to by defendant's counsel.)

Answer. I so understood, and Mr. Grant seemed to impress my mind very forcibly that such was his intention.

[MEM.—The counsel for def't objects to all the conversation between Strong and Grant, because it was afterwards reduced to writing between the parties and signed by them.]

After this agreement the work seemed to be progressing very favorably. I know of no specific conversation after this.

Cross-examined:

This agreement was afterwards reduced to writing. I saw the contract after it was signed by the parties.

JOHN A. GRIMES.

30 DANIEL J. MOFFAT, of lawful age, a resident of Washington, D. C., by occupation an agent, a witness produced and sworn on behalf of the plaintiff, deposeth and saith:

I have heard read the testimony of Mr. John A. Grimes, and confirm his statement.

DAN'L J. MOFFAT.

SAMUEL STRONG, of lawful age, a resident of Washington, D. C., by occupation a builder and contractor, the plaintiff in this case, deposeth and saith:

On the morning of the 27th November, 1869, I sent for Mr. Grant to

come over where I was building a sewer, the next block from where his buildings were, in 2d street east. He came to me and wanted to know why I was dissatisfied. I told him that he had told me that he had paid $12,000 on that ground where the buildings were, and I had found out that he had not paid a dollar on it. I said it was better that I
31 should lose a few hundred dollars than to lose eight or nine thousand; and unless he secured me in some way I should do no more than to work up the materials that I had on the ground. I said, "If you secure me I won't do any more than to put up the cellars ready for the beams, for the reason that you are not doing the work according to the specifications and the agreement we had." I told he had no drains to the cellar, and that he allowed the water to stand in the trenches under the foundation, which was very injurious to the buildings; he allowed the walls to be exposed to the weather, which froze the joints all out, and the base course was not as thick and laid as required by the specifications. He went away and sent a man to me by the name of Richardson, a lawyer. Richardson said that Grant had authorized him as his agent to say to me if I would lend him $500 that day, on the 27th November, 1869, that Grant would annul the first contract and
32 make a new contract for $7 a thousand instead of $8.50, (conversation objected to by def't's counsel, because agreement was afterwards reduced to writing and signed by the parties,) and give me a negotiable note at 90 days. I said, "Very well; tell Mr. Grant to come over." Mr. Grant came over in a very few minutes. I asked him if Mr. Richardson had told him what we talked about. He said he had. Mr. Grimes and Mr. Moffatt were by when I said "I must either have a good endorser or I cannot go any further." He said it would be hard for him to get an endorser; that he had been disappointed in getting some money from the Government, and his credit was not very good; said the Gov't owed him about $30,000; but he said that if I saw fit I could put a mechanics' lien upon the work, and that would make it as safe as if I had deed of trust. I said, "Very well; if that will make it all right, as you say it will, go and get your papers drawn up, and I'll fetch the check for $500 over to your office," which I did. That check
33 was cashed in my bank, where I did my business, and deducted from my account. Mr. Grant wanted me to keep this conversation with me about loaning the money and putting on the lien quiet. The work then progressed. I think the 24th December, 1869, they commenced to measure, and the men that I had sub-contracted to do the work, about the 1st of January, 1870, brought the measurement to me, signed by Capt. Grant. I am quite positive that on the 6th of January, in this room, the note was given for $1,547, and dated back to the 1st of January. The next day Gen. Richardson, Mr. Grant's attorney, came to me and asked me if I had employed anybody to put the lien on. I said I had spoken to some one, and intended to do that day. He said, "Let me do it." He told me the expense would be $25. I paid him either $20 or $25 for drawing up the lien. He fetched it to me
34 and said, "Now, that is as good as gold. Go put it on record immediately." I did so. About the 28th or 29th of March Richardson came to me in a great hurry, as I was passing the city hall, and asked me if I would take an order on the Government for that note of Grant's.

(Counsel for d'f't objects here to everything said by Richardson.)

Mr. Grant has, since this note has been given, said that he would pay it, and has called 'round to the either the next day or the day after that I loaned him the $500. I have never transferred the note.

Ques. Did you understand by the negotiable note mentioned in the second agreement a note either well endorsed or one secured by a mechanics' lien upon the said buildings; and did you accept and sign the contract with that understanding?

(Objected to by defendant's counsel.)

35 Ans. I signed with understanding, and accepted the contract with that understanding; and I loaned him the $500 with the understanding that I was to have an endorsed note or a mechanics' lien. I have never been paid. I have paid for all the materials and work done. I deducted $1.50 per thousand from the first contract if he would make me secure.

Cross-examined:

When I say I never transferred the note I mean that the note has always belonged to me; and I put it into the bank, in my own name, for collection. I never transferred it to Mr. Walker. He never had it. I never gave it to him.

SAMUEL STRONG.

Plaintiff's counsel files Exhibits A & B, which are objected to by def'd's counsel.

36 DEFENDANT'S TESTIMONY.

ALBERT GRANT, of lawful age, a citizen of Washington, D. C., and by occupation an architect, the defendant in this case, having duly , deposeth and saith:

I am the defendant in this cause. I had a contract with Mr. Strong to do certain work for me. The contract is dated October, 1869. I have the contract before me. He did not perform the first contract as stipulated. The contract required him to lay up the foundations during the fall months; I think before the 1st of January, 1870; that is, up to the cellar floor, ready for the floor-joists. He was to furnish everything but the bricks. I had abundance of bricks, according to my part of the contract, on the ground. I think it was about when ⅔ of the
37 work, about $1,000 worth of the foundation, was laid, I went on to the work, and found it stopped, or nearly so, contrary to his agreement with me. I think it was some time between the first and 10th of November. Mr. was the sub-contractor under Strong. On the notice of Mr. I went to Mr. Strong about the work. Mr. Strong told me he was satisfied, so far as I was concerned, with the contract, and that I had lived up to every part of it, which I had done, having delivered the deed and everything to Gen. Totten, according to contract; that he wanted me to give up the contract when it was laid up to the cellar-floor, for two reasons: 1st. That he had not the funds to go on with those buildings and his city work and complete them both; and, 2d, that he had just taken a contract with Mayor Bowen, and wanted to get another for numbering the buildings; and that,
38 Mayor Bowen and myself being enemies, he could not get these contracts if he went on with me. (Objection by pl'ff's counsel on the ground that this conversation was reduced to writing and signed by the parties.) I told Mr. Strong that the contract gave me the power to annul it at any moment when he refused to go on with it, and place other men there at his expense; and that unless he went on and furnished material, such as lime and sand, which Mr. Jarrett was wait-

ing for, I should immediately put men there to carry the work up to the cellar-beams. He then asked me to defer it for a day or two, and he would see me again. The next day, or two days after, he met me at the office. He then said he had a proposition to make; that he would lay the brick up to the beams for $7 a thousand—that is, up to the first-
floor joists—and also would take my note, at 3 months' time, after
39 the work was finished, without any security or lien upon the buildings, and if I wanted two thousand dollars he would loan it to me. I declined at that time to give him a positive answer in relation to it; that my part of the contract was all performed; that I had no money to pay out; that the matter lay with him; that I would take time for consideration and let him know in a day or two. I considered the matter, and, owing to parties refusing to go in with Strong—that is, to furnish material—I concluded to accept his proposition. The great objection was to his bad reputation. And, on his coming to me, we agreed on the second contract, but it was specially and positively agreed between us that there were to be no liens upon these buildings, on account of its affecting operations with other parties. It was upon these terms that I agreed to give up the first contract. This was on
the 27th day of November, in the forenoon, when Gen. Rich-
40 ardson brought a contract to me to sign, dated November 27, 1869; and in this contract was stated that the taking of the note should not interfere with the lien on the buildings. This I objected to, and the contract was changed without that clause being put in; and we signed it on that same day, in the presence of Richardson and Fletcher. I will state here that Richardson had been Strong's lawyer from the commencement of the first contract in October, had examined all papers, and done all business in the first contract, as in the second, and that he never was my lawyer in the business between Strong and myself. Mr. Strong did not complete his second contract. There was the entire front of the building, and two ends, about 3 feet below the beams, that he never completed, and declined to do so; but rather than
have any further trouble with the man I settled up with him and
41 gave him my note for $1,547. I did not pay the note when due, because I received a letter from Mr. Walker.

(Defendant here submits letter, marked Exhibit 1. Pl'ff's counsel objects to exhibit.)

I had the money to pay for the note at that time. I saw Mr. Walker personally. He said Strong had got the note, by false pretences, out of the bank. He should hold me responsible for it. I saw Strong. He told me it was true the note was deposited in bank to Walker's credit, with Strong's check for $500 to be paid out of the note; and that it was so written on the note itself. I found this to be true on inquiry at the bank, and declined to pay the note when due. On March 31, 1870, another man claimed this note.

(Defendant here puts in Exhibit 2. Pl'ff's counsel objects to exhibit.)

42 I saw, in a few days afterwards, this gentleman, Mr. Wollard. He said he owned the note. I asked him particularly whether he claimed to own the note or not. He stated that he did own that note personally; that he bought it of Strong. The note was, I think, presented after maturity. The letter was written on Mar. 31, and the note was due April 4. I think the note was presented in front of the Metropolitan Hotel, after the maturity of the note. I cannot be positive. The $500 spoken of by Strong, in his testimony, had nothing to do with

the contract. I gave him my note for the amount, payable at ten days, from the 27th December, and it was paid at maturity. Strong's testimony is false in regard to my ever telling him I had paid $12,000 on the property. I stated that I had given securities for $15,000 to
43 erect those buildings, to the parties I bought that property of, which securities I had given, and that the only lien upon his property was $1,132 on the purchase-money; and the only thing that was ever said about liens, was before the signing of the first contract, in the presence of Gen. Richardson, when I told him that if I failed in any of my contracts he would have a lien. I never should have given up the first contract, and made a second, if he had claimed any lien.

Cross-examined:

All my part of the first contract has been complied with, I believe, to the letter. In addition I put water in the houses, which my contract did not call for. The draining of the cellar is not required in my part of his contract, but I put men on and bailed the cellars out at
44 his request, and at great expense.

Nothing was said about security for the note, in form, shape, or manner, except that, before the contract was made, it was agreed there should be no securities—I mean the second contract—and he stated distinctly that my note was good enough. Something was said about security in the paper which Richardson brought, and which I refused to sign. I saw the paying-teller at the bank. I do not recollect that I saw the check. I think the note was presented to me. I did not look for endorsements. Wollard did not state that he held the note for collection. He told me the note was his; that he bought it of Strong. I accepted of the work as done under the second contract. The work was not completed, but I accepted it to get rid of him. I
45 demanded of Strong to complete his contract, in presence of Mr. Jarrett, and he declined because it was not in the contract.

In relation to Strong's statement that I declined to cover the walls up, I will state that the contract required him to cover the walls up, and he declined to cover the walls up, and he bound to deliver the building perfect.

A. GRANT.

CHRISTOPHER JARRETT, recalled for defendant.

Mr. Grant furnished the brick as fast as they were required during the time I was working for Strong on those buildings. The supply of bricks was full. I think Mr. Strong stated to me, in the latter part of November, that he would stop the work unless Gen. Grant gave
46 him something more tangible to go upon. As near as I can remember, stated there was a misunderstanding; that he was paying his money out on an uncertainty; that he had ascertained that Mr. Grant had not paid $12,000, on the ground, as he stated that he had. A few minutes previous he stated that was his *his* reason for discontinuing the work, and said I had better tell Gen. Grant that he wished to see him, which I did. At the time of this conversation, I judge he might have had half or two-thirds of the work done, up to the first-floor beams.

Strong had taken one city contract. He was devoting himself, I think, to the sewer contract at that time.

(Objected to by pl'ff's counsel.)

Mr. Strong laid the walls up to the first-floor joists, except the front and the two ends, which were left down the depth of the between 2½ and 3 feet.

47 Cross-examined:

It was not necessary, in order to receive the first-floor joists, that the front walls should have been raised any higher.

CHRIS. JARRETT.

48 EXHIBIT No. 1.

WASHINGTON, *March 21st*, 1870.

Capt. A. GRANT.

SIR: On or about the 18th day of February last, Samuel Strong, for a good and valuable consideration, sold and delivered to me a certain promissory note of fifteen hundred and forty-seven dollars, or thereabouts, made by you, and which note falls due on the 1st and 4th days of April next; that said note has been surreptiscially obtained from the possession of the Bank of the Republic, where I had deposited the same, upon an order of Samuel Strong, & without my knowledge or consent. You are therefore hereby notified & forbidden to pay or cause to be paid said note to any person but myself or to my order.

Yours, &c.,

G. L. WALKER,
909 13*th St.*

49 EXHIBIT No. 2.

WASHINGTON, D. C., *March* 31, 1870.

Gen. A. GRANT.

DEAR SIR: I hold a note drawn by you, payable to the order of Samuel Strong, dated Jan'y 1, 1870, and due the first day of April, 1870, and made payable at the National Bank of the Republic, for fifteen hundred and forty-seven dollars and twenty-three dollars and ninety-eight cents. You will please attend to the matter.

Yours, respectfully,

J. F. WOLLARD,
No. 700 D Street, Northwest.

50 EXHIBIT A.

WASHINGTON, D. C., *Nov. 4th*, 1869.

SAM'L STRONG, Esq.,

DEAR SIR: Please inform me by letter, care Fountain Hotel, whether you were able to secure the appointment of which I spoke to you at our last meeting. I shall be out of the city until Monday next. Since I saw I have been reflecting upon the matter of your agreement for the laying of the brick-work on the houses of Capt. A. Grant. I am the more pursuaded that you have no cause of apprehension as to the matter of your pay. I should delay the work until the deed was placed in the hands of Mr. Totten, properly signed and ready for delivery. That will secure the property to you, subject only to a mortgage thereon of about $1,100.00. I am satisfied that Grant can and will satisfy that mortgage within the time agreed for the delivery of the deed; beside you will have the first mechanics' lien upon all of the property to the full amount of your contract, which of itself will make you perfectly secure for any work you may do.

51 You have, in my judgement, but one thing to apprehend, viz, the captain is a pushing but quick-tempered man, but with your

knowledge of men and large experience in building, you can manage him. I mention the above that you may know how to take him.

I would crowd the work from the start. Keep him busy and he will not have time to fault-find.

Yours, truly,

HOLL. RICHARDSON.

52 EXHIBIT B.

WASHINGTON, *May 5th*, 1870.

Capt. A. GRANT.

SIR: I hereby give you notice that I withdraw the notice heretofore served upon you, forbidding you to pay a note of fifteen hundred and forty-seven dollars, or thereabouts, made by you, & payable to the order of Samuel Strong. You are therefore at liberty to pay the same to the holder thereof.

Yours, &c.,

G. L. WALKER.

53 EXHIBIT C.

WASHINGTON, *Jan'y* 5, 1870.

Col. SAM'L STRONG.

D. SIR: Yours of yesterday was received, and in reply would say that I have made an arrangement with Gen'l Grant to back up the ashler on the front & end and bay windows foundation, & as for the pears they never appeared on the plan as for the foundation of the chimneys. I spoke to Mr. Grant about that when we was laying the foundation, and he, (Mr. Grant,) said the foundations of the chimneys could be put in after the beams was on. I consider we have finished the work according to your contract, and Gen'l Grant has agreed with me to do the balance of the work, excepting the pears.

Yours, truly,

CHRIS. JARRETT.

54 AUGUST 11, 1870.

JOHN A. GRIMES recalled by counsel for plaintiff.

I, John A. Grimes, was employed by Col. Samuel Strong to superintend the general business connected with the brick-layers and labourers employed on the 16 buildings of Capt. Albert Grant, and also to attend to and supervise the building of a sewer near by these buildings for the said Samuel Strong.

I have a personal knowledge of a contract between Grant and Strong for the brick-work of these 16 buildings, and know that Grant called to see Strong frequently before commencing to work on the buildings, and Grant was very anxious to know when Strong would be ready to go to work. I heard Strong tell Grant to have the foundations dug out,
55 and to have all things ready, and to be sure to have a drain to the cellars to keep the water out. Grant said he would have it done or sink a well outside and pump it out, and would have the deed made out to Strong for one of the buildings, and have it left with Enoch Totten. Grant stated that he had paid $12,000 on those lots, and that a deed would be good security for all the money he, Strong, would expend on his buildings. Grant's calls on Col. Strong was so frequent that it amounted to an an'oyance, and Grant showed great anxiety to have Strong do the work.

Grant in his interviews with Strong boasted about what he was worth, and represented it to be a large amount, and that he would have in a short time 33,000 doll's more, from a claim he had against the U. S. Government. This talk took place about the first of November, 1869.

56 After the work of the buildings had started and progressed, and about one-half of the foundation and cellar walls was up Strong found out that Grant had misrepresented to him about his wealth and credit, and that Grant had not paid $12,000 on the lots that he was building on. Strong, after he had found out that Grant had deceived him, and had made gross misrepresentations to him, on the 27th day of November, Col. Strong sent for Grant to come across the street near the building, and Grant came, and I was present when they had a talk about the matter. Col. Strong told Grant that he had deceived him about his having paid $12,000 on those lots, and in other respect', as to his (Grant's) wealth and credit, and then and there told Grant that he had done work enough, and paid out

57 his money far enough, without a prospect of getting anything for it, and Strong told Grant that he would stop the work as soon as his workmen had worked up the mortar, sand, and lime that was on hand at the buildings.

Grant then proposed to Col. Strong to continue on with the work and build up the foundations ready for the first floor of beams, and he, "Grant," would pay him for it by a negotiable note at 90 days, for the amount of work done, at $7.00 per thousand. A conversation about security was talked over, and Capt. Grant told Strong that the property would be good security with a lien on it, and Grant told Strong that he could have the lien on the buildings, but he knew he would be prepared to take up the note before it became due. Then Capt.

58 Grant asked Col. Strong to loan him $500, which Strong consented to do. Strong told Grant to go and have a contract drawn up and he would give him a check for the $500, which was done, and the new contract signed.

Grant was frequently on the work after this, and was well pleased with the work, and so expressed himself frequently and in my presence. And when the *the* work was done, and contract complied with, the work was measured up, and Col. Strong paid up his bricklayers in full for the balance due them, which balance was not ascertained till after all was measured, and this payment was in full for all the work done on the 16 buildings. Col. Strong having settled up with all those furnishing sand and lime, &c., &c., the entire indebtedness was squared up in full for labor and material, on the completion of the contract. The knowledge of this is known to undersigned, he having kept the books and was familiar with the accounts.

59 The certificate of measurement was signed by Capt. A. Grant, and the acceptance of the work done under the contract, and the said Capt. A. Grant gave Col. Samuel Strong a negotiable note for the amount of work done, at 90 days after date, and Grant expressed himself fully satisfied with the job, and stated that Strong had filled his last contract to his entire satisfaction, and Capt. Grant and Col. Strong was good friends, and met frequently in my presence and took social drinks together, and I heard of no disagreement till after the note above spoken of became due.

JOHN A, GRIMES.
Washington, D. C.

JOHN A. GRIMES, cross-examined:

Gen. Grant told Strong, in Strong's parlor, that he had paid
60 $12,000 on those lots. He did not say how he had paid it. He did not say there was security to that amount. I know from Grant's frequent calls, and from his repetition of the same thing, which seemed to be understood by the parties, that his calls amounted to a nuisance. I heard Grant say he was worth $50,000, which was to be largely increased when he got his claim from the Government. I do not know whether he got claim. I know that Col. Strong found out the misrepresentations by what was said to Mr. Strong in my presence. That is all I know about it. When Grant was called across the street by Strong, Grant did not seem to demur to the charge of misrepresentation. He did not say he had given security for the $12,000. I don't recollect what he said about security, if he said anything. It was at this same conversation that Grant spoke about the lien on the buildings. I heard Grant express himself pleased with the work.

JOHN A. GRIMES.

61 JOHN COLLINS, of lawful age, a resident of Washington, D. C., and by occupation a brick-layer, a witness produced and sworn on behalf of the plaintiff, deposeth and says:

We did the work on those buildings from the first floor, Mr. Dobson & I.

The granite ashlers came ready to be set, some time in March, I think, the last of them; I never saw ashler blocked up with brick before it was set. Some of the ashlers were so thick that they projected through the wall. The east gable, end of the main buildings was taken down in order to set the ashlers. I suppose it must have been an alteration. Mr. Grant expressed himself perfectly satisfied. He said he never had a better set of mechanics work for him in his life.

Cross-examined:

I had some few words with Gen. Grant on Monday morning, when
62 I demanded a settlement from him. I considered it was my contract with my partner. It was my contract jointly with my partner, Walter B. Dobson. It was not signed by me. I was a silent partner in the concern.

Re-direct:

My difficulty with Grant does not affect my mind. I am on my oath.

JOHN COLLINS.

WILLIAM S. BOYD, of lawful age, a resident of Washington, D. C., by occupation a clerk in Washington post-office, a witness on behalf of the plaintiff, deposeth and saith:

The undersigned was present from the commencement to the finishing of "Strong's" last contract of laying the "brick" and furnishing the mortar for laying said brick for (16) basements built on A street south, between 2d and 3d streets, Capitol Hill. All the walls were
63 up ready to receive the first "tier" of beams except the south fronts, and the west gable, end of the building belonging to Mr. Ford, the man that furnished the brick; these fronts were left down by the orders of Mr. Grant, to receive the cut stone which was not ready at the time, but was being cut by Mr. Heustis. Mr. Grant had made arrangements with Mr. Jarrett to back up the "ashler," and do any brick-work that remained to be done which could not be done by Mr. Strong at the time. The east gable-end walls were built up level for the beams. Grant said there would be no "ashler" on 3d street; that was the reason

the brick-work was put up. The cellars were not properly dug; the men waited for the "trenches" to be dug, the "jogs" along the front to be dug, and "privie-vaults" to be cleaned out, and in fact Mr. Jarrett laid out the whole building, front and rear. Mr. Jarrett and myself were present when Strong told and urged Mr. Grant to cover the walls
64 up, but Grant said that he did not want the walls covered up, but would have a coat of cement spread over them; that it was better than boards.

Strong replied, very well, have your own way, the walls are yours. Grant promised Mr. Strong to keep the water out of the cellars; Mr. Strong loaned Grant a pump for that purpose. I was also present on the 27th day of November, 1869, when the first contract was annulled, and on that day (27th) a new contract was made, and Grant borrowed ($500.00) five hundred dollars for (10) ten days from Mr. Strong, and his note for the same was protested. I heard Mr. Grant say that he was well pleased with the whole work, and before the note became due he would receive his $33,000.00 from the U. S. Government and pay Strong punctually. Mr. Grant at one time told S. Strong not to let any outsider know that he (Strong) held a "mechanics' lien" on his (Grant's) block of buildings. Mr. Strong promised Mr. Grant he would
65 not, if he would pay the note when it became due, which Mr. Grant promised faithfully to do. This conversation took place in front of the city post-office in my presence.

WILLIAM S. BOYD,
Washington, D. C.

WILLIAM S. BOYD cross-examined by counsel for defence:

I was in Mr. Grant's office when there was a conversation to the effect that Mr. Strong had made an arrangement with Mr. Grant. That is all I know about it. I know the cellars were not properly dug, because I heard Mr. Strong and Mr. Jarrett complain and say it was necessary to have them redug. I know nothing about it from a mechanical point of view. I know what I heard them say, and what I knew them to perform. This was about the latter part of November. I heard Mr. Grant say he would keep them thoroughly cleaned. I was in Mr. Strong's
66 employ. I went to the bank to see if the note was protested. I was told it was by the clerk in the bank. I saw the note of $500 about which I testified. It was on the corner of 7th and F streets that Mr. Grant asked Mr. Strong not to say anything about the mechanic's lien. This was in December, I think.

Redirect:

The cellars were redug. I think this conversation was in December.

W'M S. BOYD.

CHRISTOPHER JARRETT recalled for plaintiff:

I made arrangements with General Grant to back up the ashler on the south part and east & west end-walls to obtain a settlement with Strong. The brick piers did not show on the plan. (Objected to by defense.) The foundation of chimneys was also postponed being
67 put on until the buildings were in course of construction. Grant said foundations for chimneys could be laid after the beams were on. The stone ashlers were not all cut at that time. Mr. Heustis was getting them out, as near as I can remember. As an expert, the ashlers could not be backed up until they were cut. I thought that General Grant was satisfied that the contract was fulfilled. Colonel Strong

would not settle with me until I had got an acceptance of the contract from Gen. Grant. Col. Strong did settle with me. Mr. Grant said he would cover the walls with cement instead of board. Mr. Grant attended to getting the water out of the cellar, and employed me to assist him. He never said it was Mr. Strong's duty. I superintended the digging of the trenches in the back building for Mr. Grant. I superintended and laid off the whole of the building, back and front. It was
between two and three months from the commencement of the
68 setting of the ashler until it was finished. I think we finished
between the middle and last of December. The work was all done as far as could be done before the first of January.

CHRIS. JARRETT.

Plaintiff files exhibit marked C. Objected to by defense.

DANIEL J. MOFFATT recalled for plaintiff.

About the middle of January, 1870, about four o'clock in the afternoon, Samuel Strong, John A. Grimes, and the undersigned got into one of the Navy-yard railroad-cars to ride up on Capitol Hill. We got in at 7th street, and there sat Capt. A. Grant, of the "boys in blue." After talking a few minutes Strong asked Grant how Mr. Hustus got along in cutting the granite ashler and water-table for his buildings.
Grant said that Mr. Hustus was to work on it, and as soon as it
69 was cut and set he had arranged and agreed with Christopher
Jarratt to back up and lay the brick behind the stone ashler, and to lay the foundations of the chimneys in the rear buildings if he chose to have it done before the beams were put on, and to do any other brickwork he might require on the buildings. Grant said he intended to take down the east end-wall that Strong had built up, and extend the granite around to the rear of the building, and put in a bay-window and face the wall with pressed brick the same as the west corner that he sold to Mr. Ford. Strong told Grant that he had taken his advice at last; that both end-buildings should be alike to make the row look well. Grant told Strong that Mr. Jarrett was a good mechanic, but he did not like Mr. Collins, Jarrett's partner, and that Strong had given him a good
job, and further said that he, Strong, had fulfilled his last contract
70 to his entire satisfaction, and that he was only sorry that Strong
was not agoing to finish his buildings. Grant said the U. S. Government owed him a large sum of money, which he expected they would soon pay him, and as soon as it was paid he would not wait for the note he gave Strong to become due, but would pay it immediately, so that the lien that Strong had on the buildings would not affect the sale of his houses. He, Grant, said Strong had befriended him when much in need. Grant said after he had got the act passed to build the sewer through 2d street, and after it was built, Mayor Bowen would not allow him to drain his buildings into it, and Grant then swore he would defeat Bowen for the next mayor. Capt. Grant, Samuel Strong, and John A. Grimes, and the undersigned got out at Whitney's Hotel, on Capitol
Hill. We all went in and took a drink with Strong, came out, and
71 separated. I further state that the brick-layers never had to wait
for lime, or sand, or any materials while the work on the foundations was progressing. The day that Mr. Strong gave Capt. Grant notice that if he did not secure him in some way, that as soon as the mortar that was made and the sand and lime used up on the foundations which was then at the buildings, that he, Strong, would stop the work, there was enough mortar, lime, and sand to last the brick-layers two days, if

not longer. All the time that was lost by Strong's brick-layers was caused by Capt. A. Grant not having his cellars properly dug, and the foundation-trenches not being dug, and number of old privy-house vaults had to be cleaned out; and Grant delayed the brick-layers further by not keeping the water out of the cellars, which I repeatedly heard Grant promise Strong he would do, but he failed to do so. The under-
72 signed was employed by Strong to see that the brick-layers were kept in lime and sand, which was done. Capt. A. Grant requested me to go and see Mayor Bowen to get a fire-engine to pump the water out of his cellars. Strong told Grant if he did not keep the water out of the cellars, so as the brick-layers could go on with their work, he would hold him, Grant, accountable for every hour he was delayed. I did not succeed in getting the engine, and Mr. Grant promised Mr. Strong that he would work men night and day and try to keep the water out; and the masons were idle at this time over a day, and other time was lost from the same cause.

DAN'L J. MOFFATT,
Washington, D. C.

GIDEON L. WALKER, of lawful age, a resident of Washington, D. C., a lawyer by profession, a witness provided and sworn on behalf
73 of the defendant, deposeth and saith:

(Dc[illegible]nent shown exhibit marked 1.)

This is my handwriting. There has been a circle in pencil round a letter "A" which is not mine. I know the parties to this cause. The date of this note is, I think, about 1st Jan'y, 1870. Some time about the middle of Feb'y last, Colonel Strong told me that he had the note spoken of secured by a mechanic's lien, and showed me what he said was a copy of the lien, and asked me if I would not see Mr. John Van Riswick to see if I could get the money for the note. I reported to Mr. Strong that negotiations had failed. I told him there was a gentleman named Bigelow who might purchase it. But he declined. Then I asked how much money he could get along with; that I had $500 which I would not use between that and April 1, when
74 the note fell due, and I could let him have that amount. He said if he could get that am't he could get on he thought. I told him I'd go home and get the money and meet him, I forget where. I should see him anyhow. I accordingly did as I proposed—met the colonel, and we went into the Bank of the Republic together. The note was left with the bank together with a check the col. gave me for $500, to be paid out of the proceeds of the Grant note. The check was pinned to the note and laid away by some gentleman, I suppose the cashier. I have since settled the check with Mr. Strong, but it was not paid until about the 1st of July, it might have been the 10.

Question. How was it settled?

(Objected to by pl'ff's counsel.)

Answer. It was settled by a receipt from Mr. Wollard, or a written obligation from Mr. Wollard, which I transferred to Mr. Plant. I have no interest in the note now. The $500 was lent on security of
75 the note as collateral. I saw Capt. A. Grant, and he said it would be paid at maturity. At the time of the loan I think the note was in my possession. I cannot swear positively. I supposed the note was to remain there until Grant paid it and I was to have $500 out of the proceeds of the note. I was to wait until April, and the check was pinned to the note. I have never seen the note since. I inquired for it at the bank, and was told it had been withdrawn. When I wrote

the letter marked Exhibit 1, I had heard this at the bank I wrote to Grant, because I saw an order from Col. Strong, or notice rather, forbidding the payment of the check and saying it had been paid. I had been absent from the city and had not seen Colonel Strong for some time. I therefore wrote to Capt. Grant to prevent him from paying the note. I consider that my interest in the note remained until the time of settlement in July, the same as when it was put into the bank.

76 Cross-examined:

I never pretended to have any interest in the note other than the $500. I don't suppose I owned it. I did not deposit the note in my name. I don't remember that anything was said, but that the note should be left until it was paid. I think the cashier suggested that the colonel should give a check. I think nothing was endorsed on the note or check that the note should remain.

(Witness shown Exhibit B.)

I wrote that and handed it to Mr. Trigg, directed to Capt. Grant. The consideration was an order on Mr. Trigg from Col. Strong to pay $400 out of the proceeds of this suit. This exhibit is dated May 5, 1870. I saw a note from Mr. Trigg that the note had been paid, and before I got home I gave the notice, (Exhibit 1.) I settled an account with Peekskill Plough Works. I suppose Col. Strong was cognizant of it. I did not know until after I gave the notice to Grant that was the cause of stopping the payment of the check, and I do not know
77 now. I suppose it was. I have no interest now in the note. At one time, in conversation with Gen. Grant, he said Gen. Richardson had been acting as his attorney, and the first thing he knew he had turned round and filed a lien for Col. Strong against him. This conversation was about some time in April. I know Richardson's handwriting. Exhibit A is in his handwriting. Grant did not specify any time when Richardson had been his lawyer.

Re-examined:

I understood that I lent the money to Strong on the note as collateral security. I thought the note was to remain until it was paid.

Recross-examined:

I did not hold the bank responsible, but because soon after it was settled.

G. L. WALKER.

78 WASHINGTON, D. C., *Sept.* 24, 1870.

I certify that the foregoing depositions were taken in my presence, having been read over to the witnesses, having been first sworn or affirmed.

I further certify that I am not of counsel for any of the parties in this cause, or in any way interested in the result thereof.

JNO. CRUIKSHANK,
Examiner in Chancery.

79 *Order for hearing.—Filed Dec.* 28, 1870.

In the supreme court of the District of Columbia.

SAMUEL STRONG *vs.* ALBERT GRANT ET AL. } 1956. Equity dock. 10.

Enter on January, 1871, special term calendar, for hearing.

SAMUEL STRONG.

Stipulation of counsel.—Filed Mar. 21, 1871.

In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
ALBERT GRANT ET AL. } 1956. Equity docket 10.

It is hereby stipulated and agreed that the copies of contracts filed as exhibits, with the answer of defendant Grant, and marked, respectively, Exhibit A, Exhibit B, and Exhibit C, may be used in the argument of this cause, and in the consideration and judgment thereof,
80 with the same force and effect as if they were the originals of such contracts, and had been duly proven with the depositions in the cause.

ENOCH TOTTEN,
For Defendants.
WILLIAM A. COOK,
Sol'r for Plaintiff.

Decree of court.—Decree filed April 5, 1871.

In the supreme court of the District of Columbia.

SAMUEL STRONG
vs.
ALBERT GRANT ET AL. } 1956. Equity docket 10.

This cause coming on to be heard on the complaint, answer, and evidence, and argument of counsel, it is considered and adjudged this 5th day of April, 1871, that the lien of the plaintiff against the property described in his notice and complaint, viz, lots fifteen to thirty, inclusive, in square 760, in the city of Washington, D. C., be sus-
81 tained and considered valid, and that the plaintiff have judgment for the amount thereof against the defendant Albert Grant for fifteen hundred and forty-seven dollars, with interest thereon and costs.

And it is further ordered and decreed that the same be paid by Albert Grant, W'm H. Heustis, and Calvin S. Matoon, or either of them, or their heirs, administrators, or executors, agreeably to the terms of an undertaking to release said property from such lien by said persons, approved by the court, and filed therein the 18th of October, 1870, and that execution be issued against said Grant, Heustis, and Matoon, for the recovery and payment of said judgment, with interest and cost thereon.

By the court.

Appeal to general term.—Filed April 24, 1871.

The defendant, Albert Grant, hereby appeals to the general term of the said court from the decree made and entered in said cause
82 against him, at a special term of said court, on the 5th day of April, 1871.

ENOCH TOTTEN,
Sol'r for Defendants.

Proceedings before the supreme court of the District of Columbia, in general term, commencing Monday, September 25, 1871.

MONDAY, *September 25th*, 1871.

By order of the justices present, to wit, Chief Justice Cartter, and Justices Olin, Wylie, and MacArthur, the marshal proclaims the opening of the court.

THURSDAY, *October 26th*, 1871.

Session resumed pursuant to adjournment. Present, Chief Justice Cartter, Justices Olin, Wylie, Humphreys, and MacArthur.

SAMUEL STRONG *vs.* ALBERT GRANT ET AL. } 1956. Equity docket 10.

83 And now, to wit, after argument of counsel, it is this 26th day of October, 1871, ordered by the court that the decree made in this cause in special term be amended as follows: That the lien of the plaintiff against the property described in his notice and complaint, viz, lots fifteen to thirty, inclusive, was good and valid at the time of the filing of the notice of his intention to hold a lien upon said property, and the defendant having filed a written undertaking, with sureties, to release said lien, and the same being thereby released, it is now further ordered by the court that judgment be entered against the defendant Albert Grant for the sum of fifteen hundred and forty-seven dollars, with interest and costs, and that the plaintiff have execution therefor against said Grant, and that the decree against Hustis and Matoon, sureties of said Grant in said undertaking, be set aside; from which decree the def't Albert Grant prays an appeal to the Supreme Court of the United , here in open court, which is allowed.

84 *Appeal-bond to the Sup. Court U. S.—Filed Nov.* 4, 1871.

In the supreme court of the District of Columbia, the 3d day of November, 1871.

SAMUEL STRONG *vs.* ALBERT GRANT. } Equity. No. 1956. On appeal.

Know all men by these presents that we, Albert Grant, John J. Sullivan, and Winfield S. Fletcher, are bound unto the above-named Samuel Strong in the sum of thirty-five hundred dollars, to be paid to the said Samuel Strong, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 3d day of November, 1871:

Whereas the above-named Albert Grant hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree
85 rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Albert Grant shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea,

then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. GRANT.
JOHN J. SULLIVAN.
WINFIELD S. FLETCHER.

Sealed and delivered in the presence of—
L. G. HINE.
ENOCH TOTTEN.

Approved this 4 day of November, 1871.

D. C. HUMPHREYS,
Justice S. C. D. C.

86 CLERK'S OFFICE OF THE SUPREME COURT
OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, do hereby certify that originals, of which the foregoing writings are true and complete copies, are on file and of record in the clerk's office of said court; and that said originals together constitute the record of the proceedings of said court in a certain cause therein depending and lately decided, entitled

SAMUEL STRONG
v.
ALBERT GRANT ET AL. } 1956. Equity dock. 10.

In testimony whereof I hereto subscribe my name and affix the seal of said court this 1st day of February, A. D. 1872.

[SEAL.]

R. J. MEIGS, *Clerk*,
By L. P. WILLIAMS,
Ass't Clerk.

(Indorsement on cover:) No. 383. Albert Grant, appellant, vs. Samuel Strong. Dist. of Columbia sup. court. Filed 4th May, 1872.

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 170.

ALBERT GRANT, APPELLANT,

vs.

SAMUEL STRONG, RESPONDENT,

Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR APPELLANT.

Abstract of Pleadings, &c.

The bill filed April 15th, 1870, alleges that the parties are citizens of the District of Columbia; that Grant is the owner of certain lots in the city of Washington, whereon are sundry incumbrances, (not material to any question here raised;) that under a contract with Grant, Strong furnished, between October 14, 1869, and January 1st, 1870, materials and labor of the value of $1,547 in the erection of houses on said lots—wholly unpaid, and unsecured; that the said houses are still uncompleted; that on January 7th, 1870, he filed notice of lien, and plaintiff prays that Grant's interest in the premises may be sold to pay his lien.

The answer of Grant admits the performance of the work,

&c., &c., as set forth in the bill, under a certain contract, dated October 14, 1869, of which a copy is made Exhibit A, and that he is owner of the lots, and alleges that he fully performed such contract on his part, but the plaintiff refusing to go on under it, about November 27, 1869, a new contract, under seal, was made between them, by the terms of which he, Grant, was to pay for the work and materials done, &c., by *giving a negotiable promissory note* for the amount found due therefor, which he did on the 1st of January, 1870; that after said note was given, Strong transferred it before maturity to one Walker, who, at the commencement of this suit was owner thereof, and who about the time of the maturing of the note had notified the defendant not to pay the same to any other than himself, for which reason it had not been paid.

The exhibits accompanying this answer, (see Record, pp. 5 and 6,) confirm these statements. Exhibit A shows that by the contract of October 14, 1869, Strong's bill was to be paid in a specified manner, to wit: by conveyance of one of the 16 houses, and that to secure him the deed was to be executed at once and delivered in escrow. Exhibit B substitutes at its date in lieu of the October contract, this agreement, that Strong should have his bill paid at once on completion of the work, by Grant's nogotiable note, on delivery of which the conveyance in escrow was to be cancelled and title restored.

Christopher Jarrett, a witness for the plaintiff, testifies, (Record, pp. 10 and 15,) to the performance of the work.

John A. Grimes, sworn for plaintiff, testifies to a conversation between the parties *before* the contract of November 27, 1869, was written, but on the same day, and says that Strong wished an endorser on the note, but Grant replied that Strong would have a lien on the property for payment. (Record, pp. 11, 17, and 18.)

The plaintiff himself being sworn, says that he refused to go on under the contract of October 14, 1869, and that

before executing the contract of November 27, he asked to have an endorser on the note, but that Grant said he might put a lien on the property; whereupon he acquiesced and directed the record contract to be drawn up. Says also he never transferred the note—note always belonged to plaintiff, never gave the note to Mr. Walker.

Albert Grant, sworn for defendant, testifies, to the contract of October 14, 1869, proving it as set forth at page 5 of the record; to the giving up of this and making a new one November 27, 1869. That Strong's lawyer first brought him a contract providing that the taking of the note should not interfere with the mechanic's lien; that he objected to this and the contract was changed by omitting such stipulation. That he did not pay the note at maturity because of the claim made by Mr. Walker. That still later one Wollard claimed to be the owner of it. (Record, p. 16, Exhibits 1 and 2.)

Gideon L. Walker, sworn for defendant, says that in February, 1870, Strong tried to sell the note to several, and to himself; that witness let Strong have $500 on his check, and that Strong in consideration thereof left the note at the Bank of the Republic, pinned to this check, which was to be paid out of the proceeds of the note. The check was not paid until the first or tenth of July, 1870, when it was settled by the obligation of Mr. Wollard. The $500 was lent on security of the note as collateral. It was then in my possession, but can't swear positively. I consider that my interest in the note remained until the time of settlement in July, the same as when it was put into the Bank.

Points.

The testimony in regard to conversations prior to the execution of the contracts in evidence was taken under the defendant's objection for irrelevancy, and should have been disregarded. All the parol negotiations between the parties

were merged in this, and the sole material question in the case must be determined by the construction of the two written contracts, together with the subsequent fact of the transfer of interest appearing in the uncontradicted evidence of the witness Walker.

1. We maintain that the court erred in rendering a judgment that at the filing of this bill the plaintiff was entitled to a lien upon the defendant's property to the amount of $1,547.

Strong had sought to put the whole note into the market; he had in fact realized $500 out of it; and whether we call the note transferred *pro tanto*, assigned, or only pledged, it is evident that to that extent he had, in some manner, so parted with his absolute ownership that he could not maintain an action thereon for the full amount, to his private benefit. Much less could he throw aside or give up the note to be cancelled—in the language of the authority in 15 Johnson, 247, (Burdick *vs.* Green,) for, to the extent of his third part, Walker had power and right to refuse consent. Nor, on the other hand, could Strong avail himself of Walker's consent that the note might be surrendered up and the lien of the statute enforced to the full amount for their joint benefit; for the advantage given by the statute is purely a personal one, exclusively given to the original contractor, and wholly non-transferable. (Vide Stat. at L., vol. 11, p. 376, sec. 1, of chap. xvii.)

Strong does not deny that Walker had an interest of some kind in the note; nor that this interest, whatever it was, continued until, at least May 5th, 1870—some time after the commencement of the suit.

See Ex. B and evidence, pp. 23 and 17 of Record.

But Walker testifies, (p. 22 of Record,) "The $500 was lent on security of the note as collateral;" and (p. 23) "I

understood that I lent the money to Strong, on the note as collateral security." This is the fair, reasonable, and natural statement of the transaction between the parties. In the entire absence of other explanation, as here, it is the necessary one. Walker held the note, or was entitled to the note, as a collateral. Being so entitled, he alone could maintain suit upon it. If he could sue on the note, and he alone, how could Strong at the same time get judgment for a mechanic's lien upon the original indebtedness on account of which the note was given. It probably will not be insisted that one might obtain judgment on his collateral, and the other on the original debt. It must be admitted, then, there was once a time when Strong had so far parted with this note that it was no longer in his power as a cause of action, and that while the note was thus out of him he could not enforce any mechanics' lien.

But the right of lien once waived, given up, abandoned, cannot revive.

While the note was out of him, the original debt ceased to exist. How could repossession of the note bring that to life again, or make that not paid, which before was paid.

2. The original contract of October 19, 1869, expressly provided other security than that of the mechanics' lien, and therefore, while that contract remained in force, *i. e.*, until the contract of November 27, 1869, was executed, Strong had no right to the lien, (9 Mich., 213,) and this want of right at that time should be borne in mind in construing the latter contract. That provides, (Record, p. 6,) that the work and material shall "be payable * * * by *negotiable* note of said Grant." It clearly was the intention of both parties that Strong should have commercial paper on which he might, in his option, realize at once in the market. He did offer it in the market. The intention to part with what he received was utterly inconsistent with the intention to keep that alive for which it was given.

The relations of the payee of negotiable paper to the maker of it, are so diverse and inconsistent with the relations of the holder of a claim—non-negotiable—to which the statute has attached a privilege peculiar to one man, that it must be held the acceptance of such paper is the full payment and discharge of the other, at least when, as in the present case, the note is received in payment of the indebtedness to recover which the lien is claimed.

State Bank *vs.* Fletcher, 5 Wend., 85.
Haley *vs.* Prosser, 8 Watts & Serg., 133.
Thatcher *vs.* Dinsmore, 5 Mass., 299.
Chapman *vs.* Durant, 10 Mass., 51, note *a*.
Shuby *vs.* Mandeville, 6 Cranch, 264.
Rose *vs.* Persson, &c., 29 Conn., 256.

3. The use of the word "negotiable," in the contract of November 27, "requiring that the note to be given by Grant shall be of a marketable character is conclusive of the interest of the contracting parties. Strong chose a marketable form of obligation;" that he might have the benefit of it, and yet with which the lien could not run. (See Op. of Gibson J., in Jones *vs.* Shawhan, 9 Watts and Serg., p. 263, and Kinsley *vs.* Buchanan, 5 Watts., 118.)

When a note is taken in absolute discharge of the debt, it will discharge the lien.

4. In the contract of October 14, 1869, (Ex. A, Rec., p. 5,) with Grant, the appellee, Strong, agreed to receive in payment, for his performance of its stipulations, one of the sixteen houses to which the contract related. He secured himself in that contract by obtaining from Grant the execution of a deed of that house, which was held in escrow by Totten till the work was completed. Having thus selected his security and incorporated it into his contract, he would not

be at liberty to file a mechanic's lien as a superadded security. In Barrows *vs.* Baughman, 9 Mich., 213, it is held that "A builder's lien cannot exist where the agreement itself provides that the contract price shall be secured by a mortgage on the premises built upon."

See also Haley *vs.* Prosser, 8 Watts & Serg., 133.

See also Brown *vs.* Gilman, 4 Wheat., 255, and Bailey *vs.* Adams, 14 Wend., 201.

By the contract of November 27, 1869, (Ex. B, Rec., p. 5,) Strong retains this deed held in escrow by Totten as security and it is agreed that until the completion of this last contract and the payment therefor by a negotiable note, the contract of October 14, 1869, should remain in full force and effect.

During the whole progress of this work, therefore, Strong had not relied on his mechanic's lien, but had stipulated for another and presumably a more satisfactory security. The fact that he agreed to surrender this security on the completion of the work, and the receipt of Grant's note, could not vest in him a lien under the statute, the benefits of which he had thus waived, even though the note had been only taken as a substituted security, or as evidence of the existing debt. *A fortiori* the lien could not revive, when he expressly stipulated that the indebtedness should be "payable" by this note.

WM. A. MELOY,
FRANCIS MILLER,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

ALBERT GRANT, Appellant,
vs.
SAMUEL STRONG, Appellee.

Appellee's Brief.

WM. A. COOK, Attorney.

IN THE

Supreme Court of the United States.

ALBERT GRANT, APPELLANT,
vs.
SAMUEL STRONG, APPELLEE.

Appellee's Brief.

STATEMENT.

The appellant, A. Grant, was the owner of several lots of ground in the city of Washington, D. C.

The appellee, S. Strong, was a builder. On the 14th of October, 1869, a contract was entered into between the parties for the erection by Strong of sixteen houses.

Under this contract he proceeded to perform some work, but becoming dissatisfied with the conduct of Grant, he refused to complete it, alleging that he had been "deceived," and that "he feared he would not get his pay."

However this may have been, on the 27th of November the parties met and executed a new agreement, and provided for the cancellation of the old one. In this it was stipulated that Strong should finish all the brick-work upon the buildings up to the first floor joist, and that upon his doing so Grant would pay him seven dollars per thousand, payable in three months from the date of the completion, by a negotiable note, and that the original agreement should then be cancelled and declared null and void; otherwise it should remain in full force.

This agreement was fully performed by Strong, and a

measurement of the brick-work done by him made, and the amount ascertained to be one thousand five hundred and forty-[illegible]n dollars, ($1,547.)

On the 1st of January, 1870, a third and final agreement was executed, and the first fully cancelled, and Grant then gave his promissory note, payable three months after date, for work done by Strong.

This note was not paid at its maturity, on the 1st of April, 1870; it is still unpaid.

On the 15th of April, Strong, therefore, gave notice of his lien and filed a bill or petition for its enforcement. The answer of Grant was filed on the 5th of July, 1870, and assumed the position, (1,) that Strong was not entitled to a lien because he refused to finish his contract; (2,) that a note had been given him, which he had transferred to G. L. Walker, which was "outstanding," and, (3,) that Strong had agreed to receive this note in payment for his work, and was not, therefore, entitled to a lien. Such are the chief facts.

Others than Grant were made parties to the bill; but they were little else than nominal; and while they ultimately disappeared below, do not appear here. Grant only has appealed.

ARGUMENT.

(1)

The first position, that Grant had refused to execute his contract, *i. e.*, the second contract, is without the slightest foundation in fact. Exhibit "C" to Grant's answer (Record, p. 6) contains a refutation of the assertion over his own signature and that of Strong. It is the third agreement, or that of January 1, 1870, and referring to the second agreement, or that of November, 1869, recites that it "*has been fully complied with by both parties.*"

It is certainly surprising that this position was assumed.

(2.)

The second position, that the note was transferred to G. L. Walker and was "outstanding," is as devoid of truth as the first.

On the 24th of March, 1870, Walker, for some reason, in a letter to Grant, did claim the note.

Record, p. 16.

But on the 5th of May, 1870, he informed him that he did not claim it.

Record, p. 17.

Strong testified that he had "*never transferred the note.*"

Record, p. 12.

It is surprising that there was a persistent adherence to this position.

(3.)

The third position, that Strong agreed to receive a negotiable note from Grant in payment or satisfaction of his work, did receive it, and is not therefore entitled to a lien, is incorrect in fact and unsound in law.

a.

It is incorrect in fact. The relevant clause of the agreement is as follows:

"The said Strong agrees to do and finish all the brickwork upon said building up to the first floor joists without delay, upon the completion of which said Grant agrees to pay the said Strong therefor the sum of seven (7) dollars per thousand brick, the measurement to be made in accordance with the terms and provisions of the said agreement of October 14, 1869. *The same to be payable in three months*

from the date of the completion of said work by *negotiable note of said Grant.*"

This clause is contradictory, and the latter part, peculiar in phraseology.

First. It stipulates that Strong is to do designated work, and that *on its completion* he was to be paid for it by Grant; and, *second*, that the payment *was* to be made *by a negotiable note* in three months *from the date of the completion.*

The contradiction and peculiarity will be explained, if not removed, by reference to the agreement of January 1, 1870, in which this clause will be found:

"And whereas upon measurement of the brick-work done in pursuance of said agreement of November 27, 1869, the amount has been ascertained to be two hundred and twenty-one thousand, (221,000,) which, at the price agreed upon, to wit, $7.00 per M., would amount to the sum of $1,547.00 for which sum the said Grant *has given his promissory note* of even date herewith, and *payable three months after the date* thereof, in favor of Samuel Strong."

It thus appears, not that the note itself was to constitute a satisfaction of the claim, nor that it was to exclude or prevent a lien, but that it was given as evidence of indebtedness, and that only on its payment the liability of Grant would cease and the entire transaction of the parties be consummated.

The attempt, therefore, to prevent a lien by the misstatement that the note was, under the second agreement, to be received as payment of the work, must fail. It is simply untrue; a misrepresentation of the intention of the parties.

b.

But the character of the stipulation, as contained in

the second agreement, the peculiarity of its terms, the apparent uncertainty of meaning, was sufficient to justify parol evidence of its import or the intention of the parties. This was accordingly produced, and it can leave no doubt that the execution of the note was not intended to exclude the mechanics' lien or the lien authorized by the act of Congress of February 2, 1859.

Strong says Mr. Grimes and Mr. Moffat were by when I said (to Grant) I must either have a good endorser or I cannot go any further. He said it would be hard for him to get an endorser; that he had been disappointed in getting some money from the Government, and his credit was not very good. He said the Government owed him about thirty thousand dollars, ($30,000.) But, he said, if I saw fit *I could put a mechanic's lien upon the work*, and that would make it as safe as if I had a deed of trust.

Record, p. 12.

Mr. Grimes, one of the persons referred to by Mr. Strong, says a conversation about security was talked over, and *Captain Grant told Strong that the property would be good security with a lien on it, and Grant told Strong that he could have a lien* on the building; but he knew he would be prepared to take up the note before it came due.

Rec., p. 11.

Mr. Moffat, the other referred to by Strong, says that Grant said the United States Government owed him a large sum of money, which he expected that they would soon pay him, and as soon as it was paid he would not wait for the note he gave Strong to become due, but would pay it immediately, so that the lien that Strong had on the buildings would not affect the sale of his houses.

Rec., p. 21.

William S. Boyd says, I heard Mr. Grant say that he was well pleased with the whole work, and before the note became due would receive his thirty-three thousand ($33,000) from the United States Government, and pay Strong punctually. Mr. Grant at one time told S. Strong not to let any outsider know that he (Strong) held a mechanic's lien on his (Grant's) block of buildings. Mr. Strong promised Mr. Grant he would not if he would pay the note when it became due, which Mr. Grant promised faithfully to do.

This conversation took place in front of the City Post Office, in my presence. ~~No witness was produced by Grant to corroborate this testimony~~.

Rec., p. 20.

The testimony of Strong is thus fully confirmed. Opposed to it is the single and unsupported evidence of Grant.

Incorrect, then, as is the assertion that the note was to be regarded as compensation for the work done, that it was intended as a substitute for a lien, the assumption that it can be so considered legally is without any support.

It is only when it appears that it was clearly the intention that a note should extinguish a lien that it can be regarded as doing so.

The Kimball, 3 Wallace, 37.

c.

Besides, it is decided in many State cases that the execution and delivery of a note is merely "cumulative," and does not in the least affect a right to a statutory lien.

Sergent's Mechanics' Lien Law, pp. 188, 189, 192, 193;
7 Blackford, 218; 7 Iowa, p. 77.

The third position of the appellant is therefore as incorrect in law as in fact.

4.

An additional position may be assumed.

The act of Congress entitled "An act for the enforcement of mechanics' liens on buildings, and so forth, in the District of Columbia," approved February 2, 1859, provides, in section 11, "that in all proceedings *commenced*, under this act, the defendant may file a written undertaking, with surety to be approved by the court, to the effect that *he will pay the judgment that may be recovered*, and costs, and thereby release his property from the lien hereby created."

11 U. S. Stat. at Large, p. 378.

While this section designates a mode by which property may be released from a lien, it does not arrest or suspend commenced or pending proceedings. On the contrary, it allows them to be carried on in the form in which they may have been initiated, and in doing this the inquiry must be, whether a right to a lien existed at the commencement of the proceedings. If so, this fact should be found, and a judgment, based on it, of indebtedness be rendered. And this is the character or form of the judgment below, as appears from page 25 of the record, viz:

"That the lien of the plaintiff against the property described in his notice of complaint, viz., lots 15 to 30, inclusive, was good and valid at the time of filing the notice of his intention to hold a lien upon said property, and the defendant having filed a written undertaking, with sureties, to release said lien, and the same being thereby released, it is now further ordered by the court that judgment be entered against said Albert Grant for the sum of fifteen hundred and forty-seven dollars, with interest and costs, and that the plaintiff have execution therefor against said Grant," &c.

It was from this decree that the appeal was taken; but,

perhaps, it will be difficult to conceive any form or terms in which it could have been framed which would have been more in accordance with the letter or intention of the law.

5.

The decree as rendered by the Circuit Court was in the first part substantially the same, but in the second part the Circuit Court extended it so as to include in its judgment the surety.

This part of the decree was modified in General Term; "set aside." It may be suggested that possibly this modification was erroneous; for otherwise the undertaking authorized by the 11th section would tend largely to defeat just claims, first, by destroying the lien, and then by subjecting the party holding it to protracted and uncertain litigation on the obligation or undertaking, after establishing his right to a lien or judgment against the principal. This modification was made on the ground that the sureties were entitled to notice—"a day in court"—before judgment could be pronounced against them. But this they appear to have had, when it is considered that they voluntarily connected themselves with the proceedings to establish a lien months after they were commenced; and hence may possibly be regarded as having full notice of the pendency of the action. Their undertaking is "to satisfy and pay the judgment that may be recovered against the defendant on account of the lien," and the consideration, the release of the lots against which the lien may be taken.

Whether the sureties may be embraced in the judgment is a question not directly before the court; but its consideration, or any suggestion in relation to it, would be of importance, and tend to correct practice in an important class of cases.

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